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**Mohalla Construction Company v. State of Haryana, (2023-1)209 PLR 026,
PLRonline 437650**

PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice Vinod S. Bhardwaj.

MOHALLA CONSTRUCTION COMPANY – Petitioner,

Versus

STATE OF HARYANA and others – Respondents.

CWP-7061-2017 (O&M).

(i) Tender - An interpretation which is not derived from plain reading of the document cannot be inferred by vague interpretation of the Tender - A bid document has to be read as a whole and interpretation has to be based on common trade practices - The clause put the obligation on the employer to make the site available as soon as the work is awarded - The expression has to be understood to mean the actual site being made available and not a paper transaction - The responsibility to make the site “available” prima facie has to be construed as “available” for work else the clause would be superfluous and there could be a deemed possession solely from award of work. [Para 13]

(ii) Tender - Shows that any dispute or difference of any kind whatsoever in connection with the contract was to be referred to the Empowered Committee - The language of the clause is wide and not limited to only an incident of default by the Department - The clause encompasses “any dispute or difference”, of “any kind whatsoever” in “connection with” arising out of the contract “or execution of works - Clause also does not qualify that the default must be attributable to the Department before it can be termed as a referable dispute - Such a clause or condition cannot be read into as the same would amount to re-writing the contract. [Para 15]

(iii) Tender - Statutory or contractual remedies for redressal of grievances cannot be kept illusory by adopting a stand that there is no dispute or that the contractor cannot be compensated - The same would amount to prejudging the rights of the contractor and his entitlement to seek damages. [Para 18]

Mr. Vivek Khatri, for the petitioner. Mr. Pankaj Mulwani, DAG, Haryana.

Vinod S. Bhardwaj. J (Oral) - (11th November, 2022) - The question that arises for determination in the present petition is as to whether reference of a dispute to the Standing Empowered Committee under an agreement can be refused by denying existence of the dispute.

2. The present writ petition has thus been filed under Articles 226/227 of the Constitution of India, seeking issuance of a writ in the nature of mandamus directing the respondents to refer the dispute between the parties to the Standing Empowered Committee as per Clause 10 of the agreement dated 16.08.2012 (Annexure P-10).

3. Briefly summarized, the facts of the case are that the respondent Department had invited tenders for the work of construction of O.P Jindal Nalwa Distributory i.e. RD 29010 to

33500, 33500 to 40000 and 40000 to 50000. The petitioner construction company being eligible for the aforesaid work had applied for the same and as the tender rate of the petitioner construction company was approved vide letters dated 29.08.2012 and 07.09.2012, letter of acceptance was also issued to the petitioner construction company. Written agreements executed between the parties have been appended with the present petition as Annexures P-7 to P-9. The work in question was thereafter initiated by the petitioner construction company. However, during the course of work, various disputes and differences cropped up between the parties in relation to restrictions by the villages of Kanwari in the execution of work from RD 40000 to 50000 and hindrance caused also due to electric pole from RD 29010 to 33500 and from forest department for work in RD 33500 to 40000. Various letters in this regard were sent to the respondent department, the receipt whereof is duly acknowledged by the respondents in their reply. So much so, the Superintending Engineer and Xen had to step in to remove the restrictions by establishing intradepartment contacts. Even the Electricity Department reported about stubborn behaviour and protest by villagers and need for police help. The villagers, however, did not allow the petitioner construction company to carry on work. Various letters and communication was sent by petitioners to the respondents to remove the restrictions and the inaction caused delay. Resultantly, the petitioner submitted letter/representations to the respondents to refer the same to the Standing Empowered Committee as per Clause 10 of the agreement between the parties for resolution of disputes. However, the respondents refused to do the needful. Hence, the present petition was filed.

4. Upon notice, the response by the respondents has been filed wherein they have taken a defence that the disputes in question were not generated by the respondent and as such the same cannot be said to be a dispute inter se the parties. There was thus no occasion for referring the representation/issues raised by the petitioner to the Standing Empowered Committee.

5. The relevant extract of the reply filed by the respondent reads thus:-

“(a) That the petitioner had undertaken the work of construction of O.P. Jindal Nalwa Distributory from outlet RD 29010 to 33500, from 33500 to 40000 and from RD 40000 to 50000 about vide agreements dated 21.09.2012 and 16.08.2012 (copies of which are already attached at Annexure P-7 to Annexure P-10).

(b) That the work undertaken by the petitioner was timebound and was to be completed with efflux of time given in the agreements. But the petitioner, vide its letters dated 26.09.2012, 01.10.2012, 19.11.2012 and 27.12.2012 wrote to the respondents thereby expressing inability to carry out work for the reasons, inter-alia, that there is restriction of villagers of village Kanwari in the execution of work from RD 40000 to 50000 and there is hindrance caused due to electric pole in execution of work from RD 29010 to 33500 and in execution of work from RD 33500 to 40000 there are certain plants of Forest Department.

(c) That the Superintending Engineer, vide Letter No.12923 dated 27.11.2012 followed by the Executive Engineer, Hansi Water Services Division, vide Letter No.8873-75 dated 23.11.2012 took immediate possible cognizance in the matter and put-in every possible effort in getting the restrictions removed by establishing the contacts intradepartment as well as inter- department. The copies of the letters are enclosed herewith as Annexure R-1.

(d) That even the Electricity Department, vide its letter No.620 dated 04.12.2012 reported that due to stubborn behaviour and protest of villagers, the work cannot be executed smoothly without police help. Copy of the letter No.620 dated 04.12.2012 is

Annexure R-2.

(e) That, on that the Executive Engineer, Hansi Water Services Division, Hansi, finding no other alternate, wrote a letter bearing No.1344-46 dated 13.03.2013 to the Police Station Sadar, Hansi and also sought police help through Sub Divisional Magistrate, Hansi vide their letter No.574-76 dated 22.03.2013. Copy of the letter No.574-76 dated 22.03.2013 is Annexure R-3.

(f) That even thereafter the villagers continued their protest and did not allow the petitioner to carry out work whereas the respondents have already put-in their best possible efforts for removing all the hindrances.

(g) That the petitioner, on the other hand, instead of bearing with the respondents, always tried to make pressure on the respondents and wrote continuous letters received vide No.453 dated 23.04.2013, 454 dated 23.04.2013 and 454 dated 23.04.2013 seeking extension of time.

(h) That the Sub Divisional Officer, Hansi Water Services Sub Division No.2, Hansi, vide Letters No.210, 211 and 212 each dated 30.04.2013 recommended the extension to the petitioner for the reasons mentioned therein in details.

Copies of Letters are enclosed at Annexure R-4.

(i) That the petitioner, on the other hand, again wrote another letter got received vide No.551 dated 18.12.2013 in order to create undue pressure despite knowledge of the fact that the reasons for the hindrances in work were even beyond the control of answering respondents yet they were in continuous effort to meet out the same.

(j) That finally, after repeated demands made by the petitioner, the time for work was extended by the Executive Engineer, Hansi Water Services Division, Hansi vide Letter No.2680-81 dated 15.06.2015 for RD 29010 to 33500 upto 19.12.2014, vide Letter No.2682-83 dated 15.06.2015 for RD 33500 to 40000 upto 19.12.2014 and last but not least, vide Letter No.2684-85 dated 15.06.2015 for RD 40000 to 50000 upto 19.12.2014, while clearly mentioning in all such letters that no extra payment/ escalation will be paid on account of this time extension. Copies of letters are attached herewith at Annexure R-5.”

6. It is thus averred that as the work of the petitioner was stalled due to encroachments /restrictions in the movements put by the villagers, the same cannot be attributed to the petitioner and hence, there was no occasion to refer the dispute to the Standing Empowered Committee as per Clause 10 of the agreement.

7. The learned counsel appearing on behalf of the petitioner, however, refers to the definition of site as prescribed in the contract and available at page No.61. It is contended that the site for execution of the work was to be made available by the respondents. The only exception for the respondents against the claim was in a case they are not able to hand over the complete site or the site is handed over in parts. However, where the site is encumbered and the petitioner is not allowed to carry on operations smoothly as per the terms of the contract, the same would not grant any insulation to the respondents. He further contends that it was not within the scope of the petitioner to get the site encumbrance free. It is prudent business efficacy that an employer has to provide encumbrance free site so as to facilitate the contractor to carry on the work. It is contended that in any case the respondents, at this stage, cannot be permitted to deny legal remedies by refusing reference of the dispute to the Standing Empowered Committee even while admitting that there were impediments created by the residents of locality in village for execution of the work. Even the agencies and instrumentalities of the State reported about

such impediments and hurdles created by the residents of the village.

8. The learned counsel appearing on behalf of the State, however, contends that it was incorporated in the tender document that the bidder should carry out a site inspection and should satisfy himself before furnishing of any bid. It is further argued that as the delay was not attributable to any act or omission on the part of the respondent. There is thus no referable dispute and the respondent department cannot be held responsible for referring the dispute.

9. I have heard learned counsel appearing for the respective parties and have gone through the documents appended with the petition.

10. In order to appreciate the controversy, it would be relevant to extract the provisions of the tender document necessary for adjudication of the case.

“1. Name of work : Construction of O.P. Jindal Nalwa Disty from RD 33500 to 40000”

“7. Site visit

The contractor/agency is advised to visit and examine the site of works and its surroundings and obtain for himself on his own responsibility and at his own cost all information that may be necessary for preparing the tenders and entering into a contract for construction of works. The costs of visiting the site shall be at the Contractor's/Agency's own expense.

The Bidder must visit and see for himself the site conditions including the geological and hydraulic data before bidding. The Haryana Irrigation Department will not be responsible if any of the information mentioned in the site investigation report, is found at variance with the site conditions during execution of the work, and consequences thereof, and nothing extra will be payable to him after approval of the tender rate on account of any variation discovered therein.”

“The SITE is the area defined as such in the Contract data”

“SITE INVESTIGATION REPORT is included in the Contract documents and is a factual interpretative report about the surface and sub-surface conditions at the site.”

“The Contractor should have satisfied himself regarding the geological and hydraulic data in respect of the work.

Engineer will not be responsible if any of the information mentioned in the site investigation report is found to be at variance with the site conditions during execution of the work, and consequences thereof, and nothing extra will be payable to the Contractor on this account.”

“The site for execution of the work will be made available as soon as the work is awarded. In case, it is not possible for the Department to make the entire site available on the award of the work, the Contractor shall arrange his working Programme accordingly. No claim, whatsoever, for not giving the site in full on award of the work or for giving the site gradually in parts will be tenable. The Contractor must satisfy himself regarding site, acquisition of land, earth lead, approach roads etc.”

“Dispute Redressal System

There will be two Empowered Standing Committee to settle the claims, one at the level of Chief Engineer for claims up to Rs.10 lacs with the following composition:-

(a) Chief Engineer Coordination HID PKL or any other Chief Engineer appointed by the

Government

(b) One official member not below the rank of Superintending Engineer and

(c) One non-official member who will be technical expert of SE level selected by the claimant from a panel of three persons given to him the Employer.

If any dispute or difference of any kind whatsoever shall arise in connection with or arising out of this Contract or the execution of works or maintenance of the works there under. Whether before its commencement, or during the progress of works or after the termination abandonment or breach of the contract, it shall, in the first instance, be referred for settlement of claims not exceeding Rs. Ten Lacs to the committee headed by Chief Engineer. The committee shall within a period of 45 days after being requested in writing by the Contractor to do so, convey its decision to the contractor. Such decision in respect of every matter so referred shall, subject to review as here in after provided be final and binding upon the contractor. In case the work is already in progress, the contractor shall proceed with the execution of the works, including maintenance thereof pending receipt of the decision of the committee as afore said with all due diligence.”

11. A reading of the above shows that the scope of work was construction of the Distributory. The scope of work did not include removal of encroachment. The site visit by the contractor was only to assess the geological and hydraulic conditions. The department claimed immunity only about the claim made in the site investigation report being at variance with the site conditions. Site investigation report was to include the factual interpretative report about the surface and subsurface condition at site. Thus, the disclaimer was only to the extent of variance in the factual interpretative report and the geological and hydraulic condition and not any further.

12. Further, in so far as availability of site is concerned, the suggestive reading is that the department may not be able to hand over the entire site at one go. The same is not akin to fastening the responsibility on the contractor to get the site vacated. The legal hurdles may have to be got removed by the department. Had it not been so, the department would have got the same incorporated in the above clause and also in the scope of work. An interpretation which is not derived from plain reading of the document cannot be inferred by vague interpretation of the Tender. A bid document has to be read as a whole and interpretation has to be based on common trade practices. The interpretation suggested by respondent is not borne out from the tender and hence such a clause cannot be read into the contract.

13. There is yet another aspect of the agreement. The clause put the obligation on the employer to make the site available as soon as the work is awarded. The expression has to be understood to mean the actual site being made available and not a paper transaction. The responsibility to make the site “available” prima facie has to be construed as “available” for work else the clause would be superfluous and there could be a deemed possession solely from award of work.

14. Hence the argument that the bidder has to satisfy himself regarding the site conditions being not akin to undertaking the work of removal of encroachment, it cannot at this stage be read that there is no dispute at all. The scope of work does not incorporate keeping the site encumbrance free as well or to remove encroachment (which may not be within the domain and authority of bidder/contractor) the argument raised by the State cannot be read to be an absolutely correct interpretation. In the said circumstances, it cannot be said that there is no dispute between the parties.

15. The same leads next to the Dispute Redressal System as per the contract. Perusal of

the same shows that any dispute or difference of any kind whatsoever in connection with the contract was to be referred to the Empowered Committee. The language of the clause is wide and not limited to only an incident of default by the Department. The clause encompasses “any dispute or difference”, of “any kind whatsoever” in “connection with” arising out of the contract “or execution of works.”

16. Hence the scope was kept wide and included all facts relating to the work and not just the contract. The clause also does not qualify that the default must be attributable to the Department before it can be termed as a referable dispute. Such a clause or condition cannot be read into as the same would amount to re-writing the contract. Determination of liability or existence of an actionable claim is to be done by the Dispute Redressal Authority and not at the stage of making a reference.

17. Taking into consideration the aforesaid circumstances and without commenting on the merits of the case, lest it should prejudice the respective stand of the parties, I do not find myself in agreement, at this stage, with the respondent-State that there is no dispute at all giving rise to any inter se claim by the petitioner for or against the respondent Corporation.

18. As a dispute has come into existence, the remedies agreed upon between the parties under the contract cannot be denied to a contractor. Statutory or contractual remedies for redressal of grievances cannot be kept illusory by adopting a stand that there is no dispute or that the contractor cannot be compensated. The same would amount to prejudging the rights of the contractor and his entitlement to seek damages.

19. Resultantly, the present petition is allowed and the respondents are directed to refer the disputes espoused by the petitioner through the representations made to the respondents to the Standing Empowered Committee within a period of 02 months of the receipt of the certified copy of this order.

20. Disposed of accordingly.

R.M.S. – Petition allowed.